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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 435

BOWMAN DAIRY COMPANY, ET AL.,
Petitioners,

vs.

UNITED STATES OF AMERICA AND
WILLIS L. HOTCHKISS,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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January 12, 1951.

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1. Throughout its brief (see, *e. g.*, pp. 13-14, 15-16) the Government attacks the breadth of the subpoena *duces tecum* and contends that it would constitute a "fishing expedition" (Br. 16). However, the Government has already waived any objection as to the breadth of the subpoena. For example, Mr. Hotchkiss, the respondent, informed the District Court that he had no "particular objection" to the form of the subpoena, and that "the government did not and never has been in this proceeding challenging" the form of the subpoena (R. 61, 62). Likewise, this point was not raised in the Government's motion to quash the subpoena (R. 72-73) or in the Statement of Points Relied Upon on appeal (R. 103-104). Accordingly, the Court of Appeals refused to consider this point,

despite the Government's belated attempts to raise it, and the Government is precluded from raising the point here. *United States* v. *Atkinson*, 297 U. S. 157, *Weade* v. *Dichmann Co.*, 337 U. S. 801. Whether only "particular identifiable objects of evidence" (Br. 19-20), or more generally "designated" categories of documents or objects (Rule 17(c)) may be inspected is not the question here.[1] The Court below holds that no documents, however broadly or narrowly designated, may be inspected under Rule 17(c) unless included in the scope of Rule 16. Moreover, as this Court noted in *Hickman* v. *Taylor*, 329 U. S. 495, 507, when considering the civil discovery rules,

> "No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession."

These remarks apply even more plainly to criminal proceedings. See Berger and Krash, "Government Immunity from Discovery", 59 Yale L. J. 1451, 1453-54, 1456-60 (1950).

2. The Government contends (Br. 13, 15, 16) that Rule 17(c) permits the production of documentary evidence only if it is to be offered in evidence at the trial. This contention is unsupportable, for Rule 17(c) provides that the court may direct documentary evidence to be produced "*at a time prior to the trial* or prior to the time when they

[1] In *Brown* v. *United States*, 276 U. S. 134, 143, the Court held that a subpoena need only specify "with reasonable particularity the subjects to which the documents called for relate." As pointed out in *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541, 554, unless such a liberal rule is applied, one "would be compelled to designate each particular paper which it desires, which presupposes an accurate knowledge of such papers, which the [party] * * * desiring the papers would probably rarely, if ever, have."

are to be offered in evidence" (Italics supplied). The Government's contention ignores the italicized language and the use of the disjunctive word "or" after that clause and thus renders it difficult to follow the claim (Br. 15) that this construction "preserves unimpaired the important function of Rule 17(c)". Instead, as Judge Lindley's dissent shows (R. 139), the opinion below "read[s] Rule 17(c) out of the books—completely delete[s] it", and "does violence to the plain language of the rule".

3. It is urged by the Government (Br. 16-17) that there is no conflict between the decision below and that in *United States* v. *Bondy*, 171 F. 2d 642 (C. A. 2). This position is untenable in view of the Government's later concession that in the *Bondy* case the Court of Appeals held that under Rule 17(c) "a district court has power to issue a subpoena *duces tecum*" (Br. 17) ordering the Government to produce documents which could not be obtained under Rule 16, because they were not obtained from or belonging to the defendants or obtained from others by seizure or process. Since the court below held to the contrary, it is submitted that a direct conflict does exist.

4. In the petition for certiorari, it was demonstrated that the resolution of the questions presented is of great significance. The Government's brief presents no argument to the contrary, in effect conceding that this case involves issues of general importance. Counsel are aware of no previous case in which this Court has considered the subject of discovery by defendants in criminal cases, either at common law or under the Federal Rules of Criminal Procedure.

Conclusion.

For the foregoing reasons and the reasons presented in the Petition for a Writ of Certiorari, the petition should be granted.

Respectfully submitted,

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